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WORKER'S COMPENSATION—TORT—Comparative Fault Principles Do Not Affect Negligent Employer's Right to Full Reimbursement of Compensation Benefits Out of Worker's Partial Third-Party Recovery—*Taylor v. Delgarno Transportation, Inc.*

I. INTRODUCTION

In *Taylor v. Delgarno Transportation, Inc.*,¹ the New Mexico Supreme Court addressed the issue of whether an employer's right of reimbursement under § 52-1-56(C)² of the New Mexico Workmen's Compensation Act³ is affected by the recent adoption of pure comparative negligence⁴ and the subsequent abolition of joint and several liability.⁵ The court held that a negligent employer, or its insurer, is entitled to full reimbursement of compensation benefits out of the worker's third-party judgment, even if the worker recovers only partial damages from a third-party tortfeasor under principles of pure comparative negligence.⁶ The majority reasoned that the Workmen's Compensation Act (the "Act") is not affected by the common-law evolution of tort principles because it is an exclusive statutory remedy.⁷

1. 100 N.M. 138, 667 P.2d 445 (1983).

2. N.M. Stat. Ann. § 52-1-56(C) (1978) provides in pertinent part:

The right of any workman . . . to receive payment or damages for injuries occasioned to him by the negligence or wrong of any person other than the employer . . . shall not be affected by the Workmen's Compensation Act, but he . . . shall not be allowed to receive payment or recover damages therefor and also claim compensation from the employer, and in such case the receipt of compensation from the employer shall operate as an assignment to the employer [or its insurer] of any cause of action, to the extent of payment by the employer to the workman. . . .

3. N.M. Stat. Ann. §§ 52-1-1 to -69 (1978).

4. *Scott v. Rizzo*, 96 N.M. 682, 689-90, 634 P.2d 1234, 1241-42 (1981), abolished contributory negligence as a complete bar to a plaintiff's recovery and adopted a standard of pure comparative negligence whereby a plaintiff's damages are reduced in direct proportion to her fractional share of the total negligence of all parties.

5. *Taylor*, 100 N.M. at 140, 667 P.2d at 447. *Bartlett v. New Mexico Welding Supply, Inc.*, 98 N.M. 152, 153-54, 646 P.2d 579, 580-81 (Ct. App.), *cert. denied*, 98 N.M. 336, 648 P.2d 794 (1982), addressed the issue of whether one of two concurrent tortfeasors could be held jointly and severally liable for the entire amount of a non-negligent plaintiff's damages, the other tortfeasor being absent and unknown. The court stated that "[j]oint and several liability is not to be retained in our pure comparative negligence system . . ." and held that a defendant is not liable for an unknown tortfeasor's proportionate share of the total damages. *Id.* at 159, 646 P.2d at 586. For purposes of clarity and conciseness, the phrase "pure comparative negligence," as used in this Note, means comparative negligence without joint and several liability.

6. 100 N.M. at 141, 667 P.2d at 448.

7. *Id.* at 140-41, 667 P.2d at 447-48. The court specifically cited N.M. Stat. Ann. § 51-1-8 (1978), which provides in pertinent part:

Any employer who has complied with the provisions of the Workmen's Compensation Act . . . relating to insurance, . . . shall not be subject to any other liability whatsoever for the death of or personal injury to any employee, except as provided

This Note reviews the courts' prior statutory construction of § 52-1-56(C) under joint and several liability. After comparing the majority and dissenting opinions, the Note analyzes the results of the holding and explores judicial and statutory alternatives.

II. STATEMENT OF THE CASE

Plaintiff Taylor was injured on June 25, 1980, while working on a portable "water tank-dog-house" unit, manufactured by Cooper Manufacturing Corporation.⁸ Taylor's employer, Inland Drilling Company, had purchased the unit from BMS Industries, Inc.⁹ Subsequently, Inland employed Delgarno Transportation, Inc. to move the unit to a new drilling site.¹⁰ During the attempted move, Taylor was injured.¹¹

Taylor collected worker's compensation benefits totalling \$61,279 from Inland's insurer, Employers Insurance of Wausau.¹² Thereafter, he filed suit against Delgarno, BMS, and Cooper.¹³ Wausau intervened, seeking reimbursement for compensation benefits paid.¹⁴ Following trial in the United States District Court for the District of New Mexico, a jury found damages of \$1,400,000 and apportioned negligence as follows: (1) Cooper 0%; (2) Taylor 5%; (3) Inland 10%; (4) BMS 35%; and (5) Delgarno 50%.¹⁵ Thereafter, Taylor settled his claim against Delgarno for \$510,000.¹⁶ Before entering judgment, the federal court certified to the New Mexico Supreme Court the question of Wausau's right to full reimbursement.¹⁷

in the Workmen's Compensation Act, and all causes of action, actions at law, suits in equity and proceedings whatever, and all statutory and common-law rights and remedies for and on account of such death of, or personal injury to, any such employee, are hereby abolished except as provided in the Workmen's Compensation Act.

8. 100 N.M. at 138-39, 667 P.2d at 445-46; Brief for Intervenor at 1-2, Taylor v. Delgarno Transportation, Inc., 100 N.M. 138, 667 P.2d 445 (1983).

9. 100 N.M. at 139, 667 P.2d at 446; Brief for Intervenor at 1, Taylor v. Delgarno Transportation, Inc., 100 N.M. 138, 667 P.2d 445 (1983). There is a discrepancy between the reported opinion and the brief as to which of the two parties, Cooper or BMS, was the manufacturer and which was the seller.

10. 100 N.M. at 138, 667 P.2d at 445.

11. *Id.* at 138-39, 667 P.2d at 445-46.

12. *Id.* at 139, 667 P.2d at 446.

13. *Id.* The action against Delgarno was for negligence. The action against Cooper and BMS was for products liability, negligent design, and failure to warn of dangers of a "water tank-doghouse" unit.

14. Brief for Intervenor at 2-3, Taylor v. Delgarno Transportation, Inc., 100 N.M. 138, 667 P.2d 445 (1983).

15. 100 N.M. at 139, 667 P.2d at 446.

16. *Id.* In other words, Taylor agreed to accept \$190,000 less than Delgarno was obligated to pay under the verdict. See *infra* note 18.

17. *Id.* The following was the precise question certified:

Where the workman has obtained a verdict against third party [sic] tortfeasors for a work related [sic] injury and the verdict, under comparative fault principles,

A 3-2 majority of the New Mexico Supreme Court held that Wausau was entitled to full reimbursement of the worker's compensation benefits paid to Taylor.¹⁸

Taylor argued that Inland's negligence should operate, under principles of pure comparative negligence, to preclude reimbursement of the \$61,279 in compensation benefits paid by Inland's insurer.¹⁹ Under the approach proposed by both Taylor and the dissent, a negligent employer, or its insurer, could claim reimbursement only to the extent that compensation benefits paid to the worker exceeded the employer's proportionate share of the worker's total damages.²⁰ The majority disagreed.

The court agreed that the principles of pure comparative negligence should govern only the third parties' liability to the injured worker.²¹ An

includes a determination that the employer is at fault and such fault is a proximate cause of the workman's injury,

(1) does such determination reduce or affect the employer's right to be reimbursed for amounts paid in compensation and medical benefits? and, if so;

(2) in what amount, assuming that an allocation of damages in proportion to the employer's percentage of fault exceeds the amounts paid by the employer?

Id. at 138, 667 P.2d at 445. This was a case of first impression in New Mexico. *Id.*

18. *Id.* at 141, 667 P.2d at 446, 448. Taylor's status at the time of the certification and before judgment was entered may be summarized as follows:

	Amount	Percent of Total Damages
Total damages determined by jury	<u>\$1,400,000</u>	<u>100%</u>
Reductions		
Taylor's negligence (5%)	70,000	5%
Immune employer's negligence (10%)	140,000	10%
Delgarno settlement	<u>190,000</u>	<u>14%</u>
Subtotal	\$1,000,000	71%
Additions		
Pre-trial settlement with Cooper	30,000	2%
Damages at the time of certification	<u>\$1,030,000</u>	<u>73%</u>

19. *Id.* at 140, 667 P.2d at 447; Brief for Plaintiff at 7, *Taylor v. Delgarno Transportation, Inc.*, 100 N.M. 138, 667 P.2d 445 (1983). After final judgment and reimbursement, Taylor's net recovery (before attorney's fees and other costs) was \$968,721 or approximately 69% of the total damages awarded by the jury.

20. 100 N.M. at 140-41, 667 P.2d at 447-48. Brief for Plaintiff at 6-7, *Taylor v. Delgarno Transportation, Inc.*, 100 N.M. 138, 667 P.2d 445 (1983).

21. 100 N.M. at 140-41, 667 P.2d at 447-48. The *Taylor* court did not challenge the jury's allocation of a percentage of the total negligence to a statutorily immune employer. Yet, the *Bartlett* court had specifically declined to deal with situations where one of the tortfeasors would be immune from liability. *Bartlett v. New Mexico Welding Supply, Inc.*, 98 N.M. 152, 154, 646 P.2d 579, 581 (Ct. App.), *cert. denied*, 98 N.M. 336, 648 P.2d 794 (1982). Therefore, the federal court's question, as certified, presumed the answer to another question which had not been resolved in New Mexico. Brief of Amicus Curiae in Support of Plaintiff's Motion for Rehearing at 1-5, *Taylor v. Delgarno Transportation, Inc.*, 100 N.M. 138, 667 P.2d 445 (1983). The possible impact of this issue on the scope of the *Taylor* holding is discussed *infra* at text accompanying notes 92-104.

employer's liability, however, is governed exclusively by the Act and without regard to fault.²² The majority therefore reasoned that the employer's negligence is irrelevant to its statutory right of reimbursement under § 52-1-56(C).²³ Moreover, the majority appeared to believe that to reduce an employer's reimbursement in proportion to its share of negligence would be tantamount to granting the worker a common-law tort remedy against the employer, in direct contravention of the exclusiveness-of-remedy provision.²⁴ The fact that § 52-1-56(C) and its supporting case law were promulgated prior to the adoption of pure comparative negligence was of no consequence.²⁵ The court cautioned that although the Act should be construed liberally in favor of the worker, its provisions may not be disregarded in the name of a liberal construction.²⁶ The majority concluded that to rule in favor of Taylor would necessitate either ignoring the Act or holding a portion of it unconstitutional as well as overruling numerous prior cases.²⁷

III. DISCUSSION AND ANALYSIS

The *Taylor* holding permits principles of pure comparative negligence to diminish the worker's third-party tort remedy, under certain circumstances, but it leaves the employer's right to reimbursement untouched. The court justified this result on the ground that the reimbursement provision of § 52-1-56(C) is shielded from tort law by the exclusiveness-of-remedy and liability-without-fault features of the Act. The court's reasoning, however, gives inadequate consideration to several key issues. Among these are: (1) the purposes of the exclusiveness-of-remedy and liability-without-fault provisions of the Act; (2) the policies underlying § 52-1-56(C); and (3) the unavoidable interaction between § 52-1-56(C) and common-law tort principles. Consideration of each of these factors suggests that the approach advocated by the *Taylor* dissent more accurately reflects the policies underlying both the Act and pure comparative negligence.

A. *Exclusiveness of Remedy and Liability Without Fault*

The primary objectives of worker's compensation are as follows: (1) to provide the worker with an expeditious and all-but-certain remedy for

22. *Taylor*, 100 N.M. at 139, 667 P.2d at 446.

23. *Id.* at 139-40, 667 P.2d at 446-47.

24. *See id.* at 141, 667 P.2d at 448.

25. *See id.*

26. *Id.*

27. *Id.*

on-the-job injuries and (2) to protect the employer from unlimited liability in tort.²⁸ The first objective is achieved by imposing on the employer absolute liability without fault for injuries arising out of and in the course of a worker's employment.²⁹ As a result, the worker need not prove negligence or fault on the part of the employer, and the latter may not raise the affirmative defenses formerly available under the common law.³⁰ The second objective of worker's compensation is necessitated by achievement of the first. It is not difficult to imagine the disastrous consequences to an employer of liability that is both absolute and unlimited. Therefore, the worker's benefits are limited by statute to something less than would be required to make the worker whole.³¹ Yet, limiting the worker's statutory recovery to subsistence benefits would not fully protect the employer if the statutory remedy were not exclusive. The exclusiveness-of-remedy feature of worker's compensation serves as a vehicle to enforce the limited-recovery provision of the Act.³² The *Taylor* court, however, viewed exclusiveness of remedy as something more.

In the *Taylor* majority opinion, the emphatic language of the exclusiveness-of-remedy provision served as a limit on judicial interpretation of § 52-1-56(C) and precluded adoption of the dissent's construction of that section.³³ Yet, nothing in the approach proposed by Taylor and embraced by the dissent would serve to abrogate the upper limits of the employer's liability as explicitly set down in the Act.³⁴ The dissent's approach would have merely prevented a negligent employer from recouping, under § 52-1-56(C), the limited benefits paid, to the extent that those benefits were less than or equal to the employer's proportionate share of the damages in a worker's third-party action.³⁵ Thus, the dissent was correct in stating that the exclusiveness-of-remedy provision limits an employer's liability but does not affect the employer's right to reim-

28. For a complete discussion of the "typical" worker's compensation act and the policies underlying its basic features, see generally 1 A. Larson, *The Law of Workmen's Compensation* §§ 1.00-3.40 (1982) [hereinafter cited as A. Larson]; W. Prosser, *Handbook of the Law of Torts* § 80 (4th ed. 1971) [hereinafter cited as W. Prosser].

29. See N.M. Stat. Ann. § 52-1-9 (1978); *Roseberry v. Phillips Petroleum Corp.*, 70 N.M. 19, 21, 369 P.2d 403, 405 (1962).

30. *Roseberry v. Phillips Petroleum Corp.*, 70 N.M. 19, 21, 369 P.2d 403, 405 (1962). N.M. Stat. Ann. § 52-1-8 (1978) specifically abolishes the defenses of assumption of the risk, contributory negligence, and negligence of a fellow-servant.

31. See N.M. Stat. Ann. §§ 52-1-41 to -50 (1978); *Roseberry v. Phillips Petroleum Corp.*, 70 N.M. 19, 21, 369 P.2d 403, 405 (1962); *Kandelin v. Lee Moor Contracting Co.*, 37 N.M. 479, 486, 24 P.2d 731, 734-35 (1933); 1 A. Larson, *supra* note 28, at 11; W. Prosser, *supra* note 28, at 531.

32. See 2 A. Larson, *supra* note 28, at § 65.11.

33. 100 N.M. at 141, 667 P.2d at 448.

34. *Id.* at 142-43, 67 P.2d at 449-50 (Payne, J., dissenting).

35. *Id.* at 143, 667 P.2d at 450.

bursment.³⁶ The right to reimbursement stems solely from § 52-1-56(C), and as originally enacted, was a secondary function of that statute.³⁷

B. The Purposes Underlying § 52-1-56(C)

1. Worker's Unencumbered Third-Party Right of Action

The Legislature clearly intended that the worker who has claimed compensation benefits not be penalized by being deprived of her opportunity to be made whole in an action against a third-party tortfeasor.³⁸ In fact, the statute begins with a provision that the worker's right to recover damages from the third-party tortfeasor "*shall not be affected by the Workmen's Compensation Act. . . .*"³⁹ Arguably, this language places the worker's third-party tort claim outside the reach of the Act's exclusiveness-of-remedy provision.⁴⁰ Equally arguable is the proposition that protection of the worker's right to be made whole, as against the third-party tortfeasor, was the primary objective of § 52-1-56(C) as first enacted.⁴¹ Moreover, the mechanism by which the employee could recover her entire damages against a third party was to be found, not in the Act, but in the then existing common-law tort principle of joint and several liability.⁴² Thus, the courts could confidently assert that: (1) an employee receiving compensation benefits has a right to sue a third-party tortfeasor and (2) this right is for the entire amount of damages.⁴³

2. The Employer's Right to Reimbursement

If allowed to keep both the tort damages and compensation benefits, the worker would realize a "windfall" or double recovery.⁴⁴ The second half of § 52-1-56(C) therefore provides that "in such a case, the receipt of benefits shall operate as an assignment to the employer [or its insurer]

36. *Id.* at 142, 667 P.2d at 449. The dissent also noted that the liability-without-fault provision pertains only to the worker's claim for compensation benefits and not to the employer's right to reimbursement.

37. *Id.* See *infra* text accompanying notes 51-57.

38. *Reed v. Styron*, 69 N.M. 262, 270, 365 P.2d 912, 917 (1961) (on motion for reh'g). Cf. *Kandelin v. Lee Moor Contracting Co.*, 37 N.M. 479, 486, 24 P.2d 731, 735 (1933) (third party should not be protected at the expense of a worker who receives compensation benefits).

39. N.M. Stat. Ann. § 52-1-56(C) (1978) (emphasis added). Cf. N.M. Stat. Ann. § 52-1-6(D) (Cum. Supp. 1983) which states in pertinent part: "Nothing in the Workmen's Compensation Act . . . shall affect, or be construed to affect, in any way, the existence of, or the mode of trial of, any claim or cause of action which the workman has against any person other than his employer. . . ."

40. See *Taylor*, 100 N.M. at 141, 667 P.2d at 448 (Payne, J., dissenting).

41. See *infra* text accompanying notes 51-57.

42. See, e.g., *Herrera v. Springer Corp.*, 85 N.M. 6, 8, 508 P.2d 1303, 1305, *rev'd on other grounds*, 85 N.M. 201, 510 P.2d 1072 (1973); *Castro v. Bass*, 74 N.M. 254, 258-59, 392 P.2d 668, 671 (1964).

43. *Castro v. Bass*, 74 N.M. 254, 257-58, 392 P.2d 668, 671 (1964).

44. *Taylor*, 100 N.M. at 141, 667 P.2d at 448.

of [the third-party] cause of action to the extent of payment by the employer to the workman."⁴⁵

New Mexico courts have consistently rejected a literal interpretation of this statutory language.⁴⁶ A partial assignment of the worker's third-party cause of action would split the cause of action and confuse the issues.⁴⁷ It is therefore well settled that the assignment language of the statute creates, not a right of assignment, but a right to reimbursement of compensation benefits paid.⁴⁸ In this way, the cause of action remains unified in the workers, and the employer's right of reimbursement becomes operative only after the worker recovers.⁴⁹

Under joint and several liability, New Mexico courts had zealously guarded the employer's statutory rights to tort immunity and reimbursement as against a third-party tortfeasor.⁵⁰ The *Taylor* majority relied almost exclusively on those cases. Yet, *Taylor* involved a different sort of controversy, one which required the court to balance the worker's right to an unencumbered third-party action against the employer's right to reimbursement.

The cases that dealt with employer-employee conflicts under § 52-1-56(C) established the following principles. First, the employer's right to reimbursement is secondary to, and contingent on, the employee's successful third-party recovery. Second, the courts are free to construe the amount and method of reimbursement in a manner consistent with the purposes of the Act and principles of fundamental fairness.

45. N.M. Stat. Ann. § 51-1-56(C) (1978).

46. See, e.g., *Kandelin v. Lee Moor Contracting Co.*, 37 N.M. 479, 486-89, 24 P.2d 731, 734-36 (1933).

47. *Id.* at 488, 24 P.2d at 735-36.

48. See, e.g., *Continental Casualty Co. v. Wueshinski*, 95 N.M. 733, 734, 625 P.2d 1250, 1251 (Ct. App. 1981) (statute confers right of reimbursement; cause of action belongs to employee); *Herrera v. Springer Corp.*, 85 N.M. 6, 8, 508 P.2d 1303, 1305 (Ct. App.), *rev'd on other grounds*, 85 N.M. 201, 510 P.2d 1072 (1973) (section 52-1-56(C) is a reimbursement statute; there is but one cause of action in the worker).

49. See *Kandelin v. Lee Moor Contracting Co.*, 37 N.M. 479, 488-89, 24 P.2d 731, 735-36 (1933). Unlike the *Taylor* majority, the unanimous court in *Kandelin* did not believe that a departure from the literal language of the statute would necessitate striking it down or ignoring it. On the contrary, the *Kandelin* court realized that a liberal construction of the statute was necessary to achieve its legislative purposes, i.e.: (1) preservation of an unencumbered tort remedy against the third party; (2) preservation of the expeditious worker's compensation remedy; and (3) prevention of double recovery. *Id.* at 486, 24 P.2d at 734-35.

50. See, e.g., *id.* at 489, 24 P.2d at 736 (1933) (employer need not seek reimbursement in a separate action against the third party; therefore, third party may not raise payment of compensation as a partial defense to a worker's tort claim); *Beal v. Southern Union Gas Co.*, 62 N.M. 38, 41, 304 P.2d 566, 568 (1956) (third party may not hold negligent employer liable for contribution as a joint tortfeasor); *Royal Indem. v. Southern Cal. Petroleum Corp.*, 67 N.M. 137, 143, 353 P.2d 358, 363 (1960) (employer's negligence does not bar its right of reimbursement; therefore, third party's liability need not be reduced to prevent double recovery by worker).

3. Employer Reimbursement: Secondary and Subject to the Worker's Third-Party Recovery

When balancing the interests of the worker against those of the employer under the Act, courts have followed a tradition of liberal construction in favor of the worker⁵¹ with the *caveat* that provisions of the Act may not be ignored in the name of a liberal construction.⁵² In *Brown v. Arapahoe Drilling Company*,⁵³ the New Mexico Supreme Court rejected an employer's argument that a worker's unsuccessful attempt to recover third-party damages was a bar to any subsequent claim for compensation benefits because the worker's failure to recover had deprived the employer of the right of reimbursement.⁵⁴ The court was quick to set straight this attempted reversal in priorities under § 52-1-56(C): "[T]he right to [reimbursement] is not such a right as should operate to destroy the benefits of the Workmen's Compensation statute. . . . The purpose of our statute is to protect the workman. . . . The intent of the [reimbursement provision] is to prevent double recovery, not to preclude any recovery at all."⁵⁵

The *Brown* court specifically relied on the principle set forth in *Reed v. Styron*, that the right to reimbursement follows, but does not precede, the employee's successful recovery from a third party.⁵⁶ Thus, under joint and several liability, the courts consistently treated the reimbursement provision of § 52-1-56(C) as secondary and subject to the worker's right to an unencumbered third-party action under the statute.⁵⁷

4. The Amount of Reimbursement Under § 52-1-56(C): A Liberal Construction in Favor of the Worker

In *Reed v. Styron*,⁵⁸ the court considered whether an employer must be reimbursed for attorney's fees awarded to an employee in the latter's

51. See *Glover v. Sherman Power Tongs*, 94 N.M. 587, 590, 613 P.2d 729, 732 (Ct. App.), *cert. denied*, 94 N.M. 675, 615 P.2d 992 (1980); *Transport Indem. Co. v. Garcia*, 89 N.M. 342, 345, 552 P.2d 473, 476 (Ct. App.), *cert. denied*, 90 N.M. 9, 558 P.2d 621 (1976) (citing *Schiller v. Southwest Air Rangers*, 87 N.M. 476, 535 P.2d 1327 (1975)); *Security Ins. Co. of Hartford v. Chapman*, 88 N.M. 292, 295, 540 P.2d 222, 225 (1975).

52. See *Transport Indem. Co. v. Garcia*, 89 N.M. 342, 345, 552 P.2d 473, 476 (Ct. App.), *cert. denied*, 90 N.M. 9, 558 P.2d 621 (1976) (citing *Graham v. Wheeler*, 77 N.M. 455, 423 P.2d 980 (1967)).

53. 70 N.M. 99, 370 P.2d 816 (1962).

54. *Id.* at 103-04, 370 P.2d at 819-20.

55. *Id.* at 104-05, 370 P.2d at 820. The court used the words "reimbursement" and "indemnity" interchangeably.

56. *Id.* (citing *Reed v. Styron*, 69 N.M. 262, 267, 365 P.2d 912, 915 (1961) (on motion for reh'g)).

57. See, e.g., *Herrera v. Springer Corp.*, 85 N.M. 6, 10, 508 P.2d 1303, 1307 (Ct. App.), *rev'd on other grounds*, 85 N.M. 201, 510 P.2d 1072 (1973) (result of worker's third-party litigation controls employer's right to reimbursement); *Transport Indem. Co. v. Garcia*, 89 N.M. 342, 345, 552 P.2d 473, 476 (Ct. App.), *cert. denied*, 90 N.M. 9, 558 P.2d 621 (1976) (section 52-1-56(C) creates, between the worker and employer, a conditional debtor-creditor relationship which becomes operative only if a third party recovery is made by the worker).

58. 69 N.M. 262, 365 P.2d 912 (1961) (on motion for reh'g).

original claim against the employer for compensation benefits.⁵⁹ The court noted that the Legislature, in enacting § 52-1-56(C), intended to avoid penalizing the employee who had received worker's compensation benefits.⁶⁰ The Act carefully protects the injured worker from payment of attorney's fees under certain circumstances.⁶¹ Moreover, reimbursement of those fees would diminish the worker's third-party recovery.⁶² The court therefore held that compensation benefits, in the form of attorney's fees, are not reimbursable under § 52-1-56(C).⁶³

The New Mexico Court of Appeals carried this reasoning one step further in *Transport Indemnity Company v. Garcia*.⁶⁴ In that case, the employer's compensation carrier brought action against an employee for reimbursement of compensation benefits out of the employee's third-party judgment.⁶⁵ The employee counterclaimed for a proportionate share of his attorney's fees and other costs of litigating the third-party suit.⁶⁶ The court upheld the worker's successful counterclaim based in part on the following reasoning: (1) worker's compensation benefits are not comparable to normal tort recovery;⁶⁷ (2) Workmen's Compensation Acts are to be construed liberally in favor of the worker;⁶⁸ and (3) where no guidance is given, fundamental fairness must be the guideline.⁶⁹ The court reasoned that, because the worker bore the burden and risk of the third-party litigation, it would be unfair to the worker and would unjustly enrich the insurer to allow the employer to benefit from the third-party action without sharing in the cost.⁷⁰

Both *Transport Indemnity* and *Reed* demonstrate that courts may adjust the amount of reimbursement in a manner consistent with the purposes underlying the Act. Under joint and several liability, § 52-1-56(C) operated to make the worker whole, and the reimbursement provision served only to prevent double recovery.⁷¹ Thus, as between the worker and employer, the interaction between the tort law and statutory remedy was never a problem. Yet, the adoption of pure comparative negligence, as interpreted by the *Taylor* court, has necessarily altered the operation of § 52-1-56(C).

59. *Id.* at 268, 365 P.2d at 915. Unlike § 52-1-56(C), the predecessor statute construed in *Reed* contained no specific listing of reimbursable benefits. See N.M. Stat. Ann. § 59-10-25 (1953).

60. 69 N.M. at 270, 365 P.2d at 917.

61. *Id.*

62. *Id.*

63. *Id.*

64. 89 N.M. 342, 552 P.2d 473 (Ct. App.), *cert. denied*, 90 N.M. 9, 558 P.2d 621 (1976).

65. 89 N.M. at 343, 552 P.2d at 474.

66. *Id.*

67. *Id.* at 345, 552 P.2d at 476.

68. *Id.*

69. *Id.*

70. *Id.*

71. See *supra* text accompanying notes 38-45.

C. *The Interaction Between Tort Law and § 52-1-56(C): The Effect of Comparative Negligence*

In Taylor's case, the jury's allocation of a portion of the total negligence to the statutorily immune employer precluded complete recovery against the third-party tortfeasors.⁷² The New Mexico Supreme Court did not analyze or justify this result. Instead, it summarily affirmed the holding in *Bartlett v. New Mexico Welding Supply, Inc.*,^{72a} that joint and several liability is not to be retained by the adoption of pure comparative negligence.⁷³ The *Taylor* majority did not discuss the possibilities for "double recovery" under § 52-1-56(C) absent joint and several liability. It simply stated that "[a]lthough a jury may apportion liability to an employer under the 'pure' comparative negligence standard, none of this apportioned negligence shall reduce the employer's right of reimbursement, regardless of the jury's finding."⁷⁴ The dissenting opinion, however, dealt in more detail with the interdependence between the statute and tort law.

As pointed out in the dissent, under principles of pure comparative negligence, a worker will realize a double recovery under § 52-1-56(C) only if the jury assesses no negligence to the employer or if the employer has paid worker's compensation benefits in an amount exceeding its proportionate share of fault as assessed by the fact finder.⁷⁵ The dissent reiterated the principle that the Act is to be construed liberally to achieve its benevolent purpose and assure the worker the full measure of her exclusive statutory remedy.⁷⁶ That Inland's comparative negligence had operated to deny Taylor a full recovery of damages was, in the dissent's view, unavoidable.⁷⁷ Nonetheless, to further reduce Taylor's recovery by requiring him to reimburse Inland would be to allow a negligent employer to escape even the limited liability of the workmen's compensation statute. The employer would thus realize a windfall at the employee's expense.⁷⁸ Such a result, in the dissent's opinion, was clearly contrary to legislative intent.⁷⁹

D. *The Effect of Taylor v. Delgarno Transportation, Inc.*

The rule in *Taylor* has laid the foundation for some unjust—and even absurd—results under § 52-1-56(C), of which the outcome in *Taylor* is only one example. The worker's position is compromised most severely

72. 100 N.M. at 142, 667 P.2d at 449.

72a. 98 N.M. 152, 646 P.2d 570 (Ct. App.), *cert. denied*, 98 N.M. 336, 648 P.2d 794 (1982).

73. *Id.* at 140, 667 P.2d at 447.

74. *Id.* at 141, 667 P.2d at 448 (emphasis in original). See *supra* note 21 and accompanying text.

75. 100 N.M. at 142, 667 P.2d at 449 (Payne, J., dissenting).

76. *Id.* at 143, 667 P.2d at 450.

77. *Id.*

78. *Id.*

79. *Id.*

where the employer's proportionate negligence exceeds that of the third-party tortfeasor and the total damages assessed exceed the amount of compensation benefits to which the worker is entitled. Assume, for example, damages of \$100,000 and compensation benefits of \$5,000. If the employer is found to be 97% negligent and the third party 3% negligent, the worker will recover \$3,000 from the third party only to turn the entire amount over to the negligent employer or its insurer. Under such circumstances, the worker's right to be "made whole" in a third-party action is not merely diminished but eliminated entirely.

Nor can the worker take comfort in the fact that she may simply do nothing with respect to her third-party right of action. In *Continental Casualty Co. v. Wueshinski*,⁸⁰ the court of appeals upheld a worker's compensation carrier's attempt to name a worker as an involuntary plaintiff in the carrier's action against the third party for reimbursement of compensation benefits.⁸¹ The court noted that the employee is an indispensable party to a third-party tort suit.⁸² The central objectives of statutes like § 52-1-56(C) are to assure that: (1) the third party pays the same damages as he would if there were no worker's compensation involved and (2) the employer comes out even, with the worker receiving any excess of the damage recovery over compensation paid.⁸³ To accomplish this objective, both the worker and the insurance carrier must be offered an opportunity to press the damage suit unless the other neglects to do so.⁸⁴ Therefore, failure to require the worker to be an involuntary plaintiff would be unjust because it would deprive the insurer of its right to reimbursement.⁸⁵

Taken together, *Wueshinski* and *Taylor* have "turned § 52-1-56(C) on its head."⁸⁶ The secondary reimbursement provision, enacted solely to prevent double recovery, has become the primary focus of the statute, and pure comparative negligence has become the enemy of the worker's compensation beneficiary whose injury involves the negligence of a third party.⁸⁷

80. 95 N.M. 733, 625 P.2d 1250 (Ct. App. 1981).

81. *Id.* at 736, 625 P.2d at 1253.

82. *Id.* at 734, 625 P.2d at 1251. There is only one cause of action against the third party and that action belongs to the worker. *Id.*; see *supra* text accompanying notes 45-49.

83. *Id.* at 735, 625 P.2d at 1252 (citing 2A A. Larson, *supra* note 28, at § 74.16). But note that Larson assumes the existence of joint and several liability which would make the worker whole. See *id.* § 71.10-.20 (1983).

84. *Id.*

85. 95 N.M. at 736, 625 P.2d at 1253.

86. Brief of Amicus Curiae in Support of Plaintiff's Motion for Rehearing at 11-12, 14-17, *Taylor v. Delgarno Transportation, Inc.*, 100 N.M. 138, 667 P.2d 445 (1983).

87. Brief of Amicus Curiae in Support of Plaintiff's Motion for Rehearing, at 16-17; Brief for Plaintiff on Motion for Rehearing at 10, *Taylor v. Delgarno Transportation, Inc.*, 100 N.M. 138, 667 P.2d 445 (1983).

Such a result is particularly ironic when one considers that worker's compensation and comparative negligence share a common origin.⁸⁸ Although comparative negligence is a more recent development, it, no less than worker's compensation, arose in response to the harshness of the common-law defenses that shielded industries from tort liability during the industrial revolution.⁸⁹ That comparative negligence should now operate to frustrate the beneficent purposes of the Act by means of "hyper-technical refinements of its meaning"⁹⁰ is difficult to comprehend.

E. Alternatives to the Holding in Taylor

The New Mexico Supreme Court has specifically rejected the option of judicially adjusting the amount of reimbursement due a negligent employer in proportion to the employer's allocated percentage of negligence.⁹¹ Instead, the court has explicitly left to the Legislature the task of realigning § 52-1-56(C) with current common-law tort principles.⁹² A third alternative may, however, be available.

1. One Remaining Judicial Alternative

The court of appeals, in *Bartlett v. New Mexico Welding Supply, Inc.*,⁹³ explicitly stated "we do not consider situations where one of the tortfeasors would not be subject to any liability; such situations might arise under either statutory or common-law provisions."⁹⁴ Moreover, the issue of whether the negligence of a statutorily immune employer should be included in the total calculus of liability in a worker's third-party tort action was neither briefed nor argued in *Taylor*. Rather, the inclusion of Inland's negligence was presented to the supreme court as a *fait accompli*.⁹⁵

Arguably, the appellate court chose not to prolong litigation by refusing to allow the jury verdict to stand, especially because the parties did not raise the issue of whether Inland's negligence was properly included. If such is the case, *Taylor* may be regarded as a sport, limited to its own particular facts and procedural history. Thus, New Mexico courts might

88. See generally 1 A. Larson, *supra* note 28, at §§ 4.00-5.30 (1982); W. Prosser, *supra* note 28, at §§ 67, 80.

89. See Scott v. Rizzo, 96 N.M. 682, 688, 634 P.2d 1234, 1241 (1981); Li v. Yellow Cab Co. of Cal., 13 Cal. 3d 804, 810-13, 532 P.2d 1226, 1230-32, 119 Cal. Rptr. 858, 862-63 (1975); 1 A. Larson, *supra* note 28, at §§ 4.00-5.30; W. Prosser, *supra* note 28, at §§ 67, 80.

90. Glover v. Sherman Power Tongs, 94 N.M. 587, 590, 613 P.2d 729, 732 (Ct. App.), *cert. denied*, 94 N.M. 675, 615 P.2d 992 (1980).

91. *Taylor*, 100 N.M. at 141, 667 P.2d at 448.

92. *Id.*

93. 98 N.M. 152, 646 P.2d 570 (Ct. App.), *cert. denied*, 98 N.M. 336, 648 P.2d 794 (1982).

94. *Id.* at 154, 646 P.2d at 581 (citing, *inter alia*, Beal v. Southern Union Gas Co., 62 N.M. 38, 304 P.2d 566 (1956)). See *supra* note 21.

95. See *Taylor*, 100 N.M. at 138-39, 667 P.2d at 445-46.

be open to a different approach wherein an employer's negligence is not considered in an employee's third-party action.

The result of such an approach would be to distribute the employer's share of liability among all other negligent parties before the court. First, the jury would determine the total damages incurred by the worker. Then, the total negligence or fault would be apportioned only among the worker and third parties. In this way, the sole barrier to a worker's full recovery in a third-party action would be the worker's own negligence. The employer's right of reimbursement would be relegated to its original and secondary function of preventing double recovery, and the conflict between the employee's and employer's rights under § 52-1-56(C), created by *Taylor*, would disappear. Finally, this approach would preclude any inquiry into the employer's negligence, thus preserving the "purity" of the exclusiveness-of-remedy and liability-without-fault provisions so important to the *Taylor* majority.

It may be argued that such an approach is unfair to the third-party tortfeasor, especially where the employer's negligence was, in fact, greater than that of the third party and the worker's negligence was minimal or nonexistent. For example, a third party who was only 3% negligent would, in the absence of employee negligence, be liable for 100% of the worker's damages. Such a result is *prima facie* inconsistent with principles of pure comparative negligence. It represents a virtual return to the principle of joint and several liability, wherein the third party was made an involuntary insurer of the employer.⁹⁶

Nonetheless, where work-related injuries are concerned, the problem of loss distribution is ultimately one of public policy.⁹⁷ Even under joint and several liability, the relief available under the Joint Tortfeasor's Act was denied to a third party whose negligence had concurred with that of an employer in causing a worker's injury.⁹⁸ If the employer is to be shielded from all tort liability whatsoever, and also retain an absolute right to full reimbursement of compensation benefits, the burden of the worker's loss must fall on either the worker or the third party or both. In many instances the third party is in a better position to bear the burden (or pass it on to the consumer) than the worker. Even so, principles of pure comparative negligence would, under this alternative approach, assure that the worker and third party would each share the burden in proportion to their relative negligence.⁹⁹

96. See *Royal Indem. Co. v. Southern Cal. Petroleum Corp.*, 67 N.M. 137, 142-43, 145, 353 P.2d 358, 361-62, 364 (1960).

97. See I A. Larson, *supra* note 28, at § 2.20; 2A A. Larson, *supra* note 28, at § 71.10.

98. See *Royal Indem. Co. v. Southern Cal. Petroleum Corp.*, 67 N.M. 137, 142-43, 353 P.2d 358, 361-62 (1960); *Beal v. Southern Union Gas Co.*, 62 N.M. 38, 41, 304 P.2d 566, 568 (1956).

99. See *Scott v. Rizzo*, 96 N.M. 682, 684, 688, 634 P.2d 1234, 1236, 1240 (1981).

One final *caveat* is in order. The trend in New Mexico decisions has been to include the negligence of all actors in the total calculus of fault when determining the proportionate liability of parties before the court. Thus far, the court of appeals has allowed juries to consider the negligence of the following persons: (1) an absent and unknown tortfeasor,¹⁰⁰ (2) a tortfeasor who had settled before a trial,¹⁰¹ and (3) a relative of the plaintiff who was not a party to the suit.¹⁰² If this trend continues, and the courts remain unmoved by the special policy considerations underlying worker's compensation, the worker's only hope for regaining an unencumbered third-party right of action rests with the Legislature.¹⁰³

2. Two Simple Legislative Alternatives

The Legislature could easily restore the original function of § 52-1-56(C) by either changing the tort law as it relates to the statute or changing the wording of the statute itself. The lawmakers need only add to the Act a provision that, in a worker's third-party tort action, the negligence of the employer is not to be considered by the jury when apportioning fault to the parties.¹⁰⁴ The advantages and disadvantages of this approach already have been discussed.

Another approach would be to replace the assignment language of § 52-1-56(C) with a provision that, where a worker recovers damages in tort against a third party, the worker must reimburse any compensation benefits paid by the employer or its insurer to the extent that such benefits exceed the proportionate share of liability, if any, allocated to the employer.¹⁰⁵

100. *Bartlett v. New Mexico Welding Supply, Inc.*, 98 N.M. 152, 159, 646 P.2d 579, 586 (Ct. App.), *cert. denied*, 98 N.M. 336, 648 P.2d 794 (1982).

101. *Wilson v. Galt*, 100 N.M. 227, 232, 668 P.2d 1104, 1109 (Ct. App.), *cert. quashed*, 100 N.M. 192, 668 P.2d 308 (1983).

102. *Marchese v. Warner Communications, Inc.*, 100 N.M. 313, 314, 318-19, 670 P.2d 113, 114, 118-19 (Ct. App.), *cert. denied*, 100 N.M. 259, 669 P.2d 735 (1983).

103. The New Mexico Court of Appeals has been asked to deal specifically with the issue of whether the conduct of a statutorily immune tortfeasor should be considered in the total calculus of negligence. *See New Mexico Highway Dep't v. Medina*, No. 7313 (N.M. Ct. App. argued Feb. 13, 1984).

104. Such a provision could easily be added as subsection D of N.M. Stat. Ann. § 52-1-56 (1978).

105. A sample statute might look something like this:

The right of any worker to receive payment or damages for injuries occasioned to him by the negligence or wrong of any person other than the employer shall not be affected by the Workmen's Compensation Act. But if such payment or damages are received, the worker shall reimburse to the employer, or its insurer, any payment by the employer to the worker for compensation, surgical, medical, osteopathic, chiropractic and hospital services occasioned by the injury, to the extent that such payment by the employer exceeds the proportionate share of liability, if any, allocated to the employer by a jury or court in the third-party action. If no negligence, fault or liability has been apportioned to the employer, the employer shall be reimbursed in full for all such payments made.

This approach would have several advantages. First, it would allow maximum third-party recovery without violating principles of pure comparative negligence. The third party would pay no more than its share of the damages. Second, it would preserve the statutory limit on the employer's total liability. The worker would be "penalized" for the employer's negligence only to the extent that the employer's proportionate share of the tort damages exceeded the statutory limit on its compensation liability. Finally, it would prevent a negligent employer from escaping completely its liability under the Act.

Such a statute would, however, change the nature of the employer's participation in, or relationship to, the worker's third-party litigation. Under the present system, an employer, or its insurer, need only intervene in the worker's third-party action for the purpose of assuring that reimbursement will occur. The amount of reimbursement is, in theory, not an issue.¹⁰⁶ Under the new statute, the employer or its insurer would need to participate more actively in the trial to prove that the employer was not negligent and was therefore entitled to full reimbursement of benefits paid to the worker. The employer would, in fact, be subjected to a limited quasi-tort liability.

Nonetheless, the interaction of tort law and § 52-1-56(C) is unavoidable, and as previously mentioned, the mode of operation of the statute is ultimately a question of public policy. The Act was promulgated to protect both the worker and the employer. Under joint and several liability, § 52-1-56(C) struck a balance between the interests of the worker and the employer at the expense of the third-party tortfeasor. The adoption of pure comparative negligence has altered that balance in favor of the third party and against the worker. In addition, the *Taylor* court's refusal to apply pure comparative negligence to the reimbursement provision has further upset the balance in favor of the employer and against the worker. Moreover, the *Taylor* holding is contrary to pure comparative negligence, in that a negligent employer may escape all liability whatsoever. If the beneficent purposes of the Act and the principle of fundamental fairness inherent in pure comparative negligence are to be preserved, subjecting the employer to a limited, quasi-tort liability seems a small price to pay. The only other alternatives are to shift liability for the employer's negligence to both the worker and third party, as suggested previously, or to leave the worker with a limited and often meaningless third-party right of action under § 52-1-56(C).

106. Under the present system, it is settled that the employer will be reimbursed in full for payment made to the worker for medical expenses and subsistence less a proportionate share of the cost of the third-party litigation. See *supra* text accompanying notes 44-49, 59-71.

IV. CONCLUSION

Taylor v. Delgarno Transportation, Inc. appears to be part of a trend toward reversing the priority of the third-party tort remedy and reimbursement provisions of § 52-1-56(C). In *Taylor*, the court applied the principles of comparative negligence unevenly. While allowing the tort law to diminish the worker's third-party damages, the court refused to alter the employer's right of reimbursement out of those damages based on its comparative negligence. It is hoped that New Mexico's courts will, in the future, give more thorough consideration to whether an employer's negligence is properly considered in an employee's action against a third-party tortfeasor. Absent action by the courts, the worker's compensation beneficiary is left to the initiative of the Legislature for protection of her rights under § 52-1-56(C).

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